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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

VANESSA OTERO, as Administrator,
etc.,

Plaintiff and Respondent,

v.

BLACK SAPPHIRE INVESTMENTS,
LLC et al.,

Defendants and Appellants.

E062116

(Super.Ct.No. RIP092365)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Thomas H. Cahraman,
Judge. Affirmed.

Thomas & Thomas and Andrew J. Thomas for Defendants and Appellants.

Law Offices of Lance G. Greene and Lance G. Greene for Plaintiff and
Respondent.

I

INTRODUCTION

Pursuant to Probate Code section 859,¹ the superior court sitting in probate entered judgment awarding double damages of \$175,592.96, plus costs, to plaintiff and respondent, Vanessa Otero, as administrator of the Estate of Edna M. McMahan, deceased (Otero or the estate), and against defendants and appellants, Black Sapphire Investments, LLC (BSI) and its principal, Wesley Sanders III (Sanders) (defendants). The damages award represents double the value of a vacant lot (the property) the estate recovered from defendants in a separate quiet title action, *Black Sapphire Investments, LLC v. Edna M. McMahan et al.* (Los Angeles Superior Court case No. TC018974) (the LASC action).

Section 859 is a civil penalty provision which allows an estate to recover double the value of property taken from the estate in bad faith. (*Estate of Kraus* (2010) 184 Cal.App.4th 103, 111-112.) The statute provides: “If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to . . . the estate of a decedent, . . . the person shall be liable for twice the value of the property recovered by an action under this part. . . . The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.” (§ 859.)

¹ All further statutory references are to the Probate Code unless otherwise indicated.

The decedent died in 1994. Nearly 12 years later, in February 2006, BSI acquired title to the property by adverse possession from the decedent based on Sanders's testimony in a default prove-up hearing in the LASC action. In 2009, that default judgment was voided and title to the property was quieted in the estate, and in 2011 the judgment quieting title in the estate was affirmed on appeal. Otero then pursued her section 859 claim for damages against BSI and Sanders, among others, in the present probate court action.

On appeal, defendants first claim that the probate court erroneously refused to dismiss the estate's section 859 damages claim, based on section 856.5 and the claim preclusion aspect of res judicata. Section 856.5 prohibits the granting of a petition brought pursuant to sections 850 to 859, "if the court determines that *the matter* should be determined by a civil action." (Italics added.) Defendants argue that, in a series of orders staying or abating Otero's probate court petition for section 859 damages pending the final adjudication of title to the property in the LASC action, the probate court necessarily "determined" that "the matter" of title, *along with the section 859 damages claim*, "should be" adjudicated in the LASC action. (§ 856.5.) In a related argument, defendants claim that the claim preclusion aspect of res judicata bars the estate's section 859 damages claim because the damages should have been adjudicated in the LASC action along with the issue of title to the property.

We reject these claims. The probate court did not determine that the section 859 damages claim "should be" adjudicated in the LASC action (§ 856.5); rather, the probate

court abated proceedings on Otero's probate court petition pending the adjudication of title to the property in the estate, in the LASC action (§ 854). Defendants' claim preclusion argument also fails because sections 854 and 859 plainly contemplate that a section 859 double damages claim may be adjudicated in the probate court *after* title to the property is adjudicated in the estate *in a separate action*.

We also reject defendants' further claim that insufficient evidence supports the probate court's determination that they acted in bad faith in acquiring title to the property in the February 2006 default prove-up hearing in the LASC action. (§ 859.) As we explain, substantial evidence supports the court's determination that defendants in bad faith wrongfully took the property from the estate.

Lastly, we reject defendants' claim that the probate court objectively demonstrated a potential bias against defendants, and thus had a duty to recuse itself and grant defendants' motion for a mistrial, after the court made a euphemistic reference to Adolf Hitler and Mother Teresa to illustrate a point. Accordingly, we affirm the judgment awarding double damages to the estate pursuant to section 859.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Preliminary Observations

Edna M. McMahan died on June 3, 1994. At the time of her death, McMahan was a widow and held title to the property solely in her name. At the time of her death, the

property was an unimproved parcel or lot located at 20834 Shearer Avenue in the City of Carson.

The property was not mentioned in McMahan's will and was not distributed to her beneficiaries following her death. McMahan's son, Roy McMahan, is the residuary beneficiary under McMahan's will. Otero is McMahan's granddaughter.

B. BSI's February 2006 Default Judgment for Quiet Title in the LASC Action

On May 24, 2005, BSI filed the LASC action against McMahan, seeking to quiet title to the property in BSI by adverse possession. Sanders, as BSI's "president," verified the complaint, but BSI did not legally exist at the time the complaint was filed because no form LLC-1 for BSI had been filed with the California Secretary of State. (Corp. Code, § 17702.01, subd. (d) [operative on Jan. 1, 2014 and providing: "A limited liability company is formed when the Secretary of State has filed the articles of organization."]; Corp. Code, former § 17050, subd. (a) [same, operative in 2005 & 2006].) A form LLC-1 for BSI was filed on July 25, 2006, over a year after the complaint was filed. BSI obtained an ex parte order allowing it to serve McMahan with its quiet title complaint by publication (Code Civ. Proc., § 415.50), but the publication notice did not include the property address or its legal description (Code Civ. Proc., § 763.020, subd. (c)).

BSI obtained title to the property by adverse possession in the LASC action following a default prove-up hearing on February 15, 2006. Sanders testified at the hearing, claiming the property had been abandoned and BSI had been in continuous and open adverse possession of it since 1998.

Specifically, Sanders testified BSI had been storing equipment and building materials on the property and had erected two block walls, a fence, and a “Keep Out/Private Property/No Trespassing” sign. Sanders authenticated and the court admitted a photograph of the property into evidence, but it was later revealed that the photograph was not a photograph of the property on Shearer Avenue that McMahan owned; it was a photograph of a different property located on Rainsbury Avenue in Carson. Prior to the default prove-up hearing, neither BSI nor Sanders had stored any building materials, erected any fences, or posted any signs on the property.

Sanders further testified and presented documentary evidence at the default prove-up hearing that, in December 2003, he paid Los Angeles County \$12,214.07 for the real property taxes *then* due on the property. But, when the court asked Sanders, “*Have the taxes been paid since December 2003?*,” Sanders answered “yes.” (Italics & underlining added.) In fact, at the time of the February 2006 hearing, no real property taxes had been paid on the property *since* December 2003.

Lastly, Sanders testified at the hearing that he tried to serve McMahan with BSI’s complaint for quiet title at her last known address in Riverside, but no one answered when he knocked on the door and he was told she no longer lived at the address. When his counsel asked him, “Did you try to find out whether Ms. McMahan had passed away or had—was [there] any records of her passing away?” Sanders answered “No.” Thus, Sanders indicated McMahan was still living.

At the conclusion of the default prove-up hearing, the court in the LASC action found all of the elements of adverse possession had been proved and entered a default judgment against McMahan, quieting title to the property in BSI. In December 2006, BSI sold the property to Designer Properties, Inc. (Designer) for \$100,000.

C. Otero's Probate Court Petition (§§ 850-859)

On May 22, 2007, Otero petitioned the probate court to probate McMahan's will and for letters of administration. Letters of administration were issued to Otero on September 27, 2007. Previously, on September 6, 2007, Otero was granted special powers to "file a Probate Code [section] 850 Petition, or take such other legal action as appropriate, to recover title" to the property.

On October 4, 2007, Otero petitioned the probate court to establish ownership of the property in the estate (§ 850, subd. (a)(2)(C)); for an order transferring the property to the estate (§ 856); and for double damages for defendants' bad faith wrongful taking of the property (§ 859) (the petition). The petition named BSI, Sanders, Designer, and Designer's president, Bianca Torrence, as respondents, and alleged that BSI and Sanders obtained title to the property by making false representations to the court during the February 2006 default prove-up hearing in the LASC action.

Defendants filed objections to the petition, claiming, among other things, that Otero's petition to vacate the default judgment should be brought in a motion for relief from the default judgment in the LASC action. Defendants asked the probate court to dismiss the petition pursuant to section 856.5, which provides that "[t]he court may not

grant a petition under this chapter if the court determines that the matter should be determined by a civil action.” Alternatively, defendants sought to continue the hearing on the petition for at least six months so they could conduct “extensive discovery” on the “wealth of legal issues” raised by the petition.

The probate court did not dismiss the petition. The hearing on the petition was originally scheduled in January 2008, but the parties entered into a series of stipulations and the probate court issued a series of orders pursuant to those stipulations, continuing the hearing and all other proceedings on the petition pending the adjudication of title to the property in the LASC action. (§ 854.)

D. The Default Judgment for BSI Is Voided and Otero Obtains Title in the LASC Action

In December 2007, Otero filed a motion in the LASC action to void the February 2006 default judgment in favor of BSI. On February 1, 2008, the motion was granted and the default judgment was voided “based on a defective record,” including the defective publication notice. (Code Civ. Proc., § 473, subd. (d) [voided judgment may be set aside at any time].)

Designer then filed a first amended complaint in the LASC action, naming Otero as a defendant and seeking to quiet title to the property in Designer. Otero cross-complained against BSI, Sanders, Designer, and Torrence, seeking to quiet title to the property in the estate.

Sanders refused to testify at his deposition in the LASC action after asserting his Fifth Amendment right against self-incrimination. The court in the LASC action later

granted Otero's motions for monetary, issue, evidence, and terminating sanctions against BSI, Sanders, and Designer, precluding each of them from contesting Otero's cross-complaint for quiet title and striking Designer's complaint for quiet title.²

On September 2, 2009, following a default prove-up hearing by Otero, the court in the LASC action entered judgment quieting title to the property in the estate and voiding BSI's December 2006 transfer of the property to Designer. BSI, Sanders, and Designer appealed, and in 2011 the Second District Court of Appeal affirmed the judgment quieting title in favor of the estate. (*Otero v. Black Sapphire Investments, LLC* (Jan. 20, 2011, B221194) [nonpub. opn.].)

E. The Trial in the Probate Court for Double Damages Under Section 859

After the 2009 judgment quieting title to the property in the estate was affirmed on appeal in 2011, the parties initiated proceedings in the probate court on Otero's pending petition. Over nine partial court days in April, May, and August 2013, Otero's claim for double damages was tried to the probate court.

² BSI and Sanders have filed an extensive request for judicial notice, asking this court to take judicial notice of three volumes of documents comprising 812 pages. We grant the request to take judicial notice of the May 5, 2009 order in the LASC action issuing terminating sanctions against BSI, Sanders, and Designer, striking their pleadings and prohibiting them from opposing Otero's cross-complaint for quiet title. We deny the remainder of the request. The rest of the documents included in the request are either included in the appellant's appendix, are not court records, or their relevance has not been shown. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1326 [only relevant material may be judicially noticed], overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; see also *People v. Franklin* (2016) 63 Cal.4th 261, 280 [court may take judicial notice of court records but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact, conclusions of law, and judgments].)

In its statement of decision, the probate court acknowledged that the property was restored to the estate in the LASC action “so title was not before the court in the trial conducted herein.” Trial was limited to the issue of whether the estate was entitled to recover double damages from BSI, Sanders, Designer, and Torrence for the bad faith wrongful taking of the property. (§ 859.) The probate court found “strong evidence” that Sanders “testified falsely” at the February 15, 2006, default prove-up hearing in the LASC action “in order to deceive the court and wrongly acquire” the property.

“As for the measure of damages” under section 859, the court found that the value of the property “was clearly \$100,000” at the time it was taken because that was the price Designer paid BSI for the property in December 2006. From the \$100,000, the court subtracted the \$12,203.52 in delinquent real property taxes BSI paid in December 2003 to arrive at \$87,796.48, then doubled that amount “to establish the statutory penalty of \$175,592.96.”

Judgment was entered in favor of Otero and against BSI and Sanders, jointly and severally, for \$175,592.96, plus costs. Otero was not awarded damages against Designer or Torrence. BSI and Sanders appealed.³

³ As indicated, Otero took nothing against Designer or Torrence, and Designer and Torrence were awarded their costs against the estate.

III

DISCUSSION

A. Overview of Sections 850 to 859

“Sections 850 to 859 are in division 2, part 19 of the Probate Code, which governs conveyances or transfers of property claimed to belong to a decedent or other person.” (*Estate of Kraus, supra*, 184 Cal.App.4th at p. 110.) The statutory scheme allows the administrator of a decedent’s estate to petition the probate court, to order the transfer of property to the estate “[w]here the decedent died . . . holding title to” the property, and where “the property or some interest therein is claimed to belong to another.” (§§ 850, subd. (a)(2)(C), 856.) The “evident purpose” of the statutory scheme “is to carry out the decedent’s intent and to prevent looting of estates.” (*Estate of Kraus, supra*, at p. 111.)

Probate Code section 859 is a civil penalty provision, “punitive in nature.” (*Estate of Kraus, supra*, 184 Cal.App.4th at pp. 111-112; *Hill v. Superior Court* (2016) 244 Cal.App.4th 1281, 1287, 1290-1292 [Prob. Code, § 859 damages are not the same as punitive damages under Civ. Code, § 3294, and the recovery of both is permitted].) Some version of Probate Code section 859, which provides for the recovery of double the value of property wrongfully taken in bad faith from a decedent’s estate, has been operative since 1850. (*Estate of Young* (2008) 160 Cal.App.4th 62, 86-87.)

B. The Judgment in the LASC Action, Adjudicating Title in the Estate, Did Not Bar the Estate's Claim for Double Damages in the Probate Court Pursuant to Section 859

Section 856.5, titled “Authority of court to grant petition; civil action,” states: “The court may not grant a petition under this chapter if the court *determines* that the matter *should be* determined by a civil action.” (Italics added.)

Defendants claim that, by its series of orders staying or abating proceedings on Otero’s probate court petition pending adjudication of title to the property in the LASC action, the probate court necessarily determined that “the matter” of the estate’s section 859 damages claim should be determined in the LASC action. (§ 856.5.) Thus, they argue, section 856.5 required the probate court to dismiss Otero’s petition, including her section 859 damages claim, pursuant to their request. We disagree.

The probate court did not determine that “the matter” of the estate’s claim for damages under section 859 “should be” determined in the LASC action. (§ 856.5.) Instead, the court merely *abated* proceedings on Otero’s probate court petition, including the estate’s section 859 double damages claim, pending adjudication of title to the property in the LASC action. (§ 854.) This was proper.

Section 854, titled “Abatement of petition,” provides: “If a civil action is pending with respect to the subject matter of a petition filed pursuant to this chapter and jurisdiction has been obtained in the court where the civil action is pending prior to the filing of the petition, upon request of any party to the civil action, the court shall abate the petition until the conclusion of the civil action.”

Here, the requirements of section 854 were met. In March 2008 and continuing through 2011, when the probate court issued its series of orders abating proceedings on the petition pursuant to the parties' stipulations, a civil action—the LASC action—was pending on the question of title to the property. Title was the subject matter of the petition, in addition to the estate's entitlement to double damages under section 859 for defendants' bad faith wrongful taking of the property. Additionally, jurisdiction over the question of title was obtained in the LASC action *before* the petition was filed in October 2007, by virtue of BSI's May 2005 complaint for quiet title and the February 2006 default judgment in the LASC action quieting title in BSI.⁴

Defendants argue that the “claim preclusion” aspect of the doctrine of res judicata barred the estate from seeking double damages under section 859, following the final adjudication of title to the property in the estate in the LASC action. They argue the

⁴ At oral argument, counsel for defendants pointed out that the LASC action was not “pending” when the petition was filed in October 2007, because the time to appeal from the February 2006 default judgment expired before October 2007. (Code Civ. Proc., § 1049 [“An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.”]; Cal. Rule of Court, rule 8.104 [time to appeal a civil action generally expires no later than 180 days after entry of judgment].) On this basis, counsel for defendants suggested the probate court had no authority to abate proceedings on the petition pursuant to Probate Code section 854. We disagree. Probate Code section 854 does not require that a civil action regarding the subject matter of a petition filed pursuant to Probate Code sections 850 to 859 be pending at the time the petition is filed. Rather, Probate Code section 854 directs the probate court to abate such a petition, upon the request of any party to the civil action, if the civil action is pending when the abatement order is made, provided jurisdiction over the subject matter of the petition was obtained in the civil action *before* the petition was filed. As explained, these requirements were met here.

estate’s “primary claim” for title to the property, along with all claims for damages and other remedies for defendants’ wrongful taking of the property, including statutory double damages under section 859, is barred because all such claims were required to be adjudicated in the LASC action. Again, we disagree.

But for sections 850 to 859, we would agree that the judgment in the LASC action adjudicating title to the property in the estate would preclude the estate from pursuing any claims for damages against defendants—to the extent such damages claims either were or should have been raised in the LASC action. “Claim preclusion, the ““primary aspect”” of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. [Citation.]” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)⁵ But the estate’s section 859 damages claim is not a claim that was required to be raised in the LASC action.

⁵ “Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action. [Citation.] In California, a ‘cause of action’ is defined by the ‘primary right’ theory. ‘The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.’ [Citation.] In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right. [Citation.] “‘If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. . . .”’” (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589-590.)

The plain language of section 854 supports this conclusion. As discussed, section 854 requires the probate court to abate proceedings on a petition brought pursuant to sections 850 to 859, pending “the conclusion” of a civil action involving the same subject matter of the petition, when any party to the civil action requests the abatement, and when jurisdiction was obtained in the civil action before the petition was filed. (§ 854.) Section 854 thus contemplates that title to property may be adjudicated in one action—as it was here—and a claim for double damages for the bad faith wrongful taking of the property (§ 859) may be adjudicated in a subsequent probate court action.

Likewise, section 855 provides that matters “normally raised” in a civil action may be adjudicated in the probate court pursuant to a petition brought under sections 850 to 859: “An action brought under this part may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part.” (§ 855.) Section 855 thus contemplates that a claim for double damages under section 859 may be adjudicated in the probate court, separately from the issue of title to the property in a civil action. Our conclusion is bolstered by section 859’s statement that its double damages remedy “shall be in addition to any other remedies available in law.”

In a similar context involving the order of proof and the bifurcation of section 859 damages issues, Division One of this court in *Estate of Young, supra*, 160 Cal.App.4th 62 observed that the issues of title to property, and whether the property was wrongfully taken in bad faith, may be bifurcated from and tried before the issue of double damages

under section 859. (*Estate of Young, supra*, at pp. 89-90.) The court noted in part that “the plain language of section 859 contemplates that a showing of liability [for bad faith wrongful taking] should be made before the [section 859] damages phase begins”; and that title to the property must also be established in the estate before section 859 damages are ascertained. (*Estate of Young, supra*, at pp. 89-90; see also *In re Pereira and Melo Dairy* (Bankr. E.D.Cal. 2005) 325 B.R. 1, 4-5 [recovery of double damages under § 859 requires that the conservator “first prevail under Section 850” and recover the property for the conservatee’s estate].)

C. Substantial Evidence Supports the Award of Double Damages Under Section 859

Defendants claim insufficient evidence supports the probate court’s determination that they were liable to the estate for double damages under section 859. As noted, “[s]ection 859 is punitive in nature” and provides for the recovery of double damages against a person who has “in bad faith wrongfully taken, concealed, or disposed of property belonging to . . . the estate of a decedent” (§ 859; *Estate of Kraus, supra*, 184 Cal.App.4th at p. 112; *Estate of Young, supra*, 160 Cal.App.4th at p. 88.)

Substantial evidence is evidence that is reasonable in nature, credible, and of solid value, and in reviewing a substantial evidence challenge to a judgment, we consider all of the evidence in the light most favorable to the judgment, giving it the benefit of every reasonable inference and resolving conflicts in support of the court’s findings. (*Estate of Young, supra*, 160 Cal.App.4th at p. 76.) Here, substantial evidence supports the probate

court's determination that BSI and Sanders acted in bad faith and wrongfully acquired title to the property by adverse possession in the LASC action.

At trial in 2013, the probate court found and substantial evidence shows that Sanders made several misrepresentations of fact in testifying at the February 2006 default prove-up hearing in the LASC action. Most significantly, substantial evidence shows that Sanders falsely testified when he asserted that he had been in open and continuous possession of the property since 1998.

As outlined above, Sanders testified at the February 2006 hearing that he had been storing materials and equipment on the property since 1998; he had erected two block walls and a fence on the property, and he had posted a "Keep Out/Private Property/No Trespassing" sign on the property. Sanders authenticated a photograph purporting to show the items he had stored on the property and the block walls and fence. But at trial in 2013, Eufemia McCaw testified she had been living next door to the property since 1988. McCaw first met Sanders in 2007 when he and Mr. Handley erected a "chicken wire fence" across the front of the property. Between 1988 and when she first met Sanders in 2007, McCaw never saw Sanders or Mr. Handley on the property; no equipment had ever been stored on the property; and no block walls, fences, or signs had been erected or posted on the property. McCaw confirmed that the photograph Sanders authenticated as a photograph of the property at the February 2006 default prove-up hearing was not a photograph of the property.

The evidence of the false photograph, and Sanders's false claims of having openly possessed the property since 1998, bolsters the probate court's conclusion that Sanders gave other false testimony at the February 2006 default prove-up hearing. For example, Sanders testified he was "the owner and president" of BSI, when, in fact, BSI had not been formed. Sanders also falsely answered "yes" in response to the court's question, "Have the taxes been paid since December 2003?" when, in fact, no taxes had been paid on the property since December 2003.⁶

Lastly, neither the address of the property nor its legal description were included in the publication notice underlying the service by publication of the quiet title complaint on McMahan. (Code Civ. Proc., § 763.020, subd. (c).) These omissions show that Sanders and BSI intended to avoid letting the estate know of their adverse possession claim and, in bad faith, wrongfully obtained title to the property by adverse possession. (Prob. Code, § 859.)

D. Defendants Did Not Demonstrate "a Probability of Actual Bias" by the Probate Court Judge; Hence, Their Motion for Mistrial Was Properly Denied

At trial, defendants claimed Sanders made "a clerical error" at the February 2006 default prove-up hearing when he authenticated the false photograph of the property.

⁶ The probate court observed that "this mistruth [by Sanders, about having paid the taxes since 2003] was not very relevant to the default hearing, because there is no requirement that a person seeking to quiet title through adverse possession pay past the five year period provided by law [and, in December 2003, Sanders paid over \$12,000 for all real property taxes then due on the property], but the point is that the judge asked a question, and . . . Sanders apparently decided that he should say whatever the judge might want to hear. His credibility is thus undermined."

Relevant to this defense of mistake, defendants sought to prove through the adverse testimony of Otero's trial counsel, Mr. Green, that Mr. Green and two of Sanders's former business associates, Messrs. Jones and Hickey, had, as the probate court put it, "engaged in a pattern of duplicitous conduct," in other adverse possession cases brought by Sanders, including the LASC action. Defendants sought to prove that Messrs. Green, Jones, and Hickey had removed signs and changed locks on properties that Sanders was seeking to obtain by adverse possession, and this explained why Sanders was confused and mistakenly authenticated the false photograph of the property.

The probate court sustained its own Evidence Code section 352 objection to the proffered testimony of Mr. Green on the grounds it would be unduly time consuming and insufficiently probative of whether Sanders was mistaken when he adduced a false photograph of the property at the 2006 default prove-up hearing. The probate court said to defendants' counsel: "So anything you ask Mr. Green better help me understand why Mr. Sanders was mistaken rather than lying when he . . . testified at the prove-up hearing. . . . [I]f he was faked out by the photo in his file, to give the wrong photo inadvertently, to that extent you [have] gotten in the door."

After noting that Otero had testified that she found out about the February 2006 default judgment when she received a letter from Mr. Hickey, defense counsel offered to prove, through the testimony of Mr. Green, that Otero only knew about the false photograph because "it just so happened that the mistaken photo . . . happened to come from another property that Jones and Sanders were partners on" and that "Hickey was

involved in, too.” Alluding to Sanders’s allegations of duplicitous conduct by Messrs. Green, Jones, and Hickey, the probate court said: “[R]egardless of whether Ms. Otero got the information [about the false photograph] because Adolf Hitler came back from the dead and told her directly, or whether Mother Teresa came back from the dead and told her directly, I don’t see what difference it makes where she got the data. The issue is your client’s conduct scienter . . . , not Jones and Hickey.”

On the following day, defense counsel moved for a mistrial, on nonstatutory due process grounds, based on the probate court’s reference to Adolf Hitler. Defense counsel argued that the reference to Hitler “rattled” Sanders, who is African- American, because it implied that the court could not be fair to Sanders given that Hitler held “certain views against African-Americans.” The motion was denied.

On appeal, defendants claim the probate court’s reference to Adolph Hitler violated canon 2A of the California Code of Judicial Ethics, which states, in part: “A judge shall not make statements . . . that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” Defendants argue their mistrial motion should have been granted on due process grounds, because the probate court’s reference to Hitler demonstrated “a probability of actual bias by a judge that is too high to be constitutionally tolerable.” In other words, defendants claim they were deprived of their due process right to a fair trial because there was an objective showing that the probate court harbored a potential for bias against them, and African-Americans generally. (*People v. Freeman* (2010) 47 Cal.4th 993, 1001, 1004-1006 [violation of due process

right to fair trial based on bias of judge requires objective showing of probability of actual bias].)

Here, the mistrial motion was properly denied because there was no showing of any potential bias on the part of the probate court toward Sanders or African-Americans. The court's references to Adolf Hitler and Mother Teresa had nothing whatsoever to do with African-Americans. The court was using the references to illustrate the point that it did not matter *from whom* Otero learned that a false photograph of the property had been introduced in the LASC action, or whether the sources of her information about the false photograph, namely, Messrs. Green, Jones, and Hickey, were, euphemistically speaking, evil persons like Hitler or saints like Mother Teresa.

IV

DISPOSITION

The judgment is affirmed. Otero shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.